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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

CHARLES E. WILSON, SECRETARY OF DEFENSE, JOHN FOSTER DULLES, SECRETARY OF STATE, WILBER M. BRUCKER, SECRETARY OF THE ARMY, GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE, MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY, GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND, PETITIONERS

v.

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Attorney General and the Solicitor General, on behalf of Charles E. Wilson, Secretary of Defense, and the other petitioners, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the above case pending in that court on the appeal of petitioners herein.

OPINION BELOW

The opinion of the District Court has not yet been reported. It is reproduced in Appendix B, *infra*.

JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus but granting declaratory relief and an injunction against petitioners was entered on June 18, 1957 (Appendix B, *infra*). A notice of appeal to the Court of Appeals for the District of Columbia was filed on June 18, 1957, and the appeal was docketed in that court on the same day. The case has not been heard, submitted to, or decided by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Rule 20 of the Rules of this Court.

QUESTIONS PRESENTED

Japan and the United States have entered into an arrangement under which the United States may exercise court-martial jurisdiction within Japan over certain offenses committed there by American servicemen, but may also decline to exercise its right to try such offenses and may remit the serviceman to a Japanese trial for violation of the local law. In this case, the United States has declined to exercise its right to try respondent by court-martial, and is prepared to remit him for trial under Japanese law. The question presented is:

Whether a United States court should review and reverse the decision of the Government that re-

spondent should not be tried by court-martial and that the Japanese courts may try him for conduct in Japan resulting in the death of a Japanese national.

TREATIES, AGREEMENTS, AND STATUTES INVOLVED

Paragraph 3 (c) of the Protocol amending Article XVII of the Administrative Agreement under the Security Treaty between the United States and Japan reads as follows:

> If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

The full text of the Protocol and of the Security Treaty and excerpts from other relevant documents are reproduced in Appendix A, *infra*.

Article 14 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 814, provides in pertinent part:

> (a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.
>
> * * * * *

Article 5 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 805, provides:

> This chapter applies in all places.

28 U. S. C. 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * * *

STATEMENT

On January 30, 1957, members of a United States military unit in Japan were engaged in exercises involving live ammunition. Because of the large number of Japanese civilian nationals present in the area, live ammunition was withdrawn and blank ammunition substituted. During an interval in the maneuvers, respondent Girard, a Specialist 3rd Class (equivalent to sergeant), and another soldier, one Nickel, were ordered to guard a machine gun and some field jackets that had been left on the far side of a hill.

Girard had a grenade launcher on his rifle. He had been armed with the same weapon during the morning exercises in which he had participated and during which he had fired some 80 rounds of ball ammunition. After the two soldiers had arrived on the ridge, Girard, on two occasions, placed an expended .30 calibre cartridge case in the grenade launcher and projected it by firing a blank. The second shot struck Mrs. Naka Sakai, a Japanese woman, who had been gathering expended brass

cartridge cases. The casing penetrated her back and caused her death.

There were conflicting accounts of the circumstances of the shooting. Some witnesses stated that the soldiers had thrown brass casings onto the ground and indicated that it was all right for the civilians to pick them up. Whatever the true facts, the Government has agreed that, for the purposes of the present stage of this litigation and only for that purpose, the killing may be deemed to have arisen out of an act done in the performance of official duty—as contended by respondent.

On February 7, 1957, Girard's commanding officer filed a certificate of official duty with the local Japanese authorities, *i. e.*, a certificate that the killing had arisen out of an act done by respondent in the performance of his official duty. Two days later, the local Japanese authorities notified the United States commanding officer who had issued the certificate that they considered that proof contrary to the certificate existed. The matter was referred to the Joint Committee which was established by Article XXVI of the Administrative Agreement (Appendix A, *infra*, pp. 18a–19a) under Article III of the Security Treaty between the United States and Japan (Appendix A, *infra*, p. 11a).

In the Criminal Jurisdiction Subcommittee of the Joint Committee, to which the matter was referred, both countries agreed that the killing of the Japanese woman was an offense against Japanese law as well as an offense against United States military law, and that, therefore, under Article XVII of the Adminis-

trative Agreement (as amended by the Protocol signed September 29, 1953) (Appendix A, *infra*, p. 23a–25a) the two countries had concurrent jurisdiction. The United States took the position that the offense was one

> arising out of any act or omission done in the performance of official duty,

and that therefore this was a case in which the United States had the primary right to exercise jurisdiction, as provided in paragraph 3 (a) (ii) of Article XVII (Appendix A, *infra*, p. 25a). Japan took the position that the offense was *not* one arising out of an act done in the performance of official duty and that therefore Japan had the primary right to exercise criminal jurisdiction.

The issue continued unresolved by the Joint Committee from early March until mid-May 1957, when the United States authorized its representatives on the Joint Committee to agree that Japan could exercise jurisdiction over respondent. It was agreed in the Joint Committee that United States military authorities would notify the appropriate Japanese authorities, in accordance with paragraph 3 (c) of the Protocol amending Article XVII of the Administrative Agreement, that the United States had decided not to exercise jurisdiction in the case. This action was thereafter taken. The certificate of official duty has not been withdrawn.

The decision of the United States not to exercise jurisdiction over respondent and to agree that Japan could exercise criminal jurisdiction over him was re-

viewed by the Secretary of Defense and the Secretary of State who concluded that it should be carried out. This decision was approved by the President. Public announcement of this determination was made, and it was communicated to the Government of Japan.

Respondent was thereafter indicted by Japan for the offense of causing a death by wounding, the least serious homicide charge for which he could have been indicted under Japanese law.

On June 6, 1957, respondent filed this petition for a writ of habeas corpus in the District Court for the District of Columbia. On the same day that court entered an order directing petitioner Wilson and others to show cause why the writ should not issue. It was further ordered:

> * * * pending hearing and determination of this application that the person of the Petitioner, William S. Girard, be not delivered to custody or control of any foreign government or power.

Return and answer to the rule to show cause was filed on June 10, 1957, and on June 11 the District Court heard argument. The court ruled that there was no material fact in issue on the record as it stood. On June 18, 1957, the District Court issued its order denying the petition for habeas corpus but granting declaratory relief and issuing an injunction against petitioners from delivering respondent to the custody of the Japanese Government. A notice of appeal was filed on June 18, 1957, and the record was docketed in the Court of Appeals on the same day.

REASONS FOR GRANTING THE WRIT

I

Respondent is now within the sovereign nation of Japan, awaiting trial by a Japanese court for an offense against Japanese law committed in Japanese territory. The Executive has agreed that, under international law and by international arrangement, Japan may proceed to trial and has duly waived any primary right to exercise jurisdiction over respondent which the United States may have. Nonetheless, the United States is restrained by judicial order from allowing Japan to take respondent into custody. That restraint inevitably interferes directly with Japan's exercise of its territorial and sovereign jurisdiction to which we have formally acceded and postpones the date of trial. Further delay will seriously aggravate an already unfortunate strain on United States-Japanese relations, as well as have an impact on our relations with other nations which have comparable arrangements with this country for the trial of American servicemen stationed in their territories.

An affidavit of the Secretary of State was submitted to the District Court indicating the urgency with which the Executive Branch has regarded the matter. The Secretary there stated that the decision not to exercise United States jurisdiction over Girard had been approved by him and by the Secretary of Defense:

* * * * *

> In addition we concluded that any prolongation of the dispute over this jurisdictional issue

might well have serious consequences upon United States relations not only with Japan, but also with many other nations.

4. Because of the imperative public importance of this matter, this joint conclusion of the Secretary of State and the Secretary of Defense was discussed with and approved by the President. It was then communicated to the Government of Japan. * * *

* * * * *

7. * * * It is a matter of importance to this country that any period of restraint prior to final decision be extremely short. Every hour in which that issue is left open on this basis prolongs a source of international friction and may have adverse effect upon our relations with Japan and other countries.

8. Because of the wide publicity that this proceeding has received, public opinion in Japan has been aroused. Any inability on the part of the United States officials concerned to honor this Government's commitment to permit Girard to be tried in the Japanese courts—particularly any such inability by reason of a temporary injunction or stay order pending final determination—will in my judgment give rise to serious difficulties in our relations with the Government and people of Japan and may involve risk of injury to United States personnel located in Japan.

A statement of the Secretary of Defense is set forth in Appendix C, *infra*. It indicates the great difficulties faced by that Department as a result of the decision below and the urgent need for an authoritative ruling.

The Government submits that all these circumstances demonstrate the imperative public importance of the case and warrant the deviation from normal appellate processes involved in granting certiorari prior to judgment in the Court of Appeals, so that the matter may be authoritatively determined, so far as the United States courts are concerned, before this Court recesses for the summer. Otherwise, the overwhelming likelihood is that the United States will be unable to fulfill its commitment to Japan for several trying months, even though the Japanese Government is very desirous of holding respondent's trial without delay and expects him to be turned over promptly. This is a case, therefore, which fulfills the specific requirement of Rule 20 that certiorari to a Court of Appeals before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

We firmly believe (as we show in Point II, *infra*) that, despite the District Court's ruling, respondent's case is totally without merit and that the Court can so decide promptly. The Government is prepared to file, within the next few days, a brief on the merits, if that is deemed desirable; it may be assumed that respondent's brief may be quickly prepared from his briefs in the District Court. If oral argument is believed necessary, the Government is ready to present it at the earliest date, convenient to the Court, and we have no doubt that respondent's counsel are equally ready and able to do so.

II

The position of the United States on the issues in the case is simple; it rests on the international aspects which the District Court has totally ignored. Under international law, Japan is sovereign within its own country. In the absence of express or implied agreement to the contrary, United States officials within Japan would be obliged by Japanese and international law to make respondent available to the Japanese authorities for trial there. Thus, if the international arrangements between the United States and Japan are invalid, respondent is plainly subject to the exclusive jurisdiction of Japan and has no claim whatever in American courts. And if, as we assert, the Security Treaty and implementing arrangements are valid, they indisputably authorize the United States to waive whatever jurisdiction it may have, including its so-called "primary" jurisdiction. This has been done in a decision approved by the highest executive officers of the Government. Such a waiver—or decision not to exercise jurisdiction—is not a justiciable issue to be decided by a court but a discretionary matter for the Executive Branch.[1]

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[1] In view of the disposition of the case by the District Court, there is no need to consider the question of whether habeas corpus is available. Under 28 U. S. C. 2241, writs of habeas corpus may be granted by district courts only "within their respective jurisdictions". In *Ahrens* v. *Clark*, 335 U. S. 188, the Court found that this limitation referred to the territorial jurisdiction of each court, and held that the District Court for the District of Columbia did not have jurisdiction to issue a writ with respect to prisoners on Ellis Island, New York.

A. JAPAN HAS EXCLUSIVE JURISTICTION WITHIN ITS TERRITORY EXCEPT TO THE EXTENT THAT IT OTHERWISE AGREES

Under international law each country is sovereign within its own territory.

> The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. * * * All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. * * * [*The Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136.]

Respondent is and at all times since the alleged offense has been within the territory of Japan. Except to the extent that Japan has consented otherwise, it has the exclusive right to define criminal offenses, to

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Subsequent decisions of this Court have left open the question of whether a different result would be reached where United States citizens were being held in custody by United States officials overseas, outside of the jurisdiction of any district court.

Even if this were still deemed a habeas corpus proceeding, the Court need not reach the question of whether the District Court for the District of Columbia has jurisdiction to grant a writ of habeas corpus for a person who at all relevant times has been in Japan. The merits are clear and the Government has agreed to treat the petition for a writ of habeas corpus as a request for equitable or declaratory relief. If the merits are clear, it is permissible to pass over a jurisdictional problem of greater difficulty where the resolution of that issue would not change the result. See *Brooks* v. *Dewar*, 313 U. S. 354, 359–360; *Johnson* v. *Eisentrager*, 339 U. S. 763, 790–791; *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604, 619–620.

conduct trials, and to impose punishment for the commission of offenses on its own soil.[2]

American citizens entering Japan are thus subject to its criminal jurisdiction unless immunity is impliedly or expressly granted. In *The Schooner Exchange, supra,* a French military vessel entered a United States port without any express arrangement as to jurisdiction. The Court found that under the customs and conditions then prevailing there was implied consent that the vessel would be immune from jurisdiction. But the Court, through Chief Justice Marshall, went on to state:

> Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. [7 Cranch at 146]

See also *United States* v. *Flores,* 289 U. S. 137; *Wildenhus' Case,* 120 U. S. 1.

There is no question of an implied immunity from Japanese jurisdiction for the respondent. The terms and conditions under which American forces remain in Japan have not been left to implication. Under international law there is no requirement that a nation in allowing foreign troops to enter must grant them immunity from local criminal prosecution,[3] and

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[2] The Japanese Peace Treaty explicitly recognizes full Japanese sovereignty "over Japan and its territorial waters" (Appendix A, *infra,* p. 5a).

[3] See Schwartz, *International Law and the NATO Status of Forces Agreement,* 53 Col. L. Rev. 1091, 1106–1107:

> Accordingly, under *The Schooner Exchange,* the receiving state may demand any conditions it wishes before it

the arrangements governing jurisdiction over American troops in Japan have been carefully worked out by treaty and implementing agreements. These give the United States certain rights to exercise jurisdiction within Japan. The basic premise, however, is that in the absence of these agreements petitioner has no implied or other exemption from Japanese criminal jurisdiction. If the treaty or agreements were non-existent or were deemed invalid, there would be no question but that the Japanese authorities could properly take respondent into custody and try him for the offense under Japanese law with which he has

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will permit friendly troops upon its soil. If these conditions are not satisfactory to the sending state it need not send the troops at all. This is a function of bargain and negotiation. To say that there is a rule of international law that friendly foreign nations have exclusive jurisdiction over their own forces does no more than to state what the situation might be in the event that the receiving state gave unqualified assent to their admission. Such a rule, if it exists at all, can play no part in determining the status of those forces where an agreement has been reached on that question.

See also Hyde, *International Law* (1945), Vol. II, p. 826, pointing out the importance of the point that a state, if it so desired, and sufficiently made known its intent, might withhold consent to any immunity and thereby retain exclusive jurisdiction.

None of the opinions in *Reid* v. *Covert*, No. 701, Oct. Term, 1955, and *Kinsella* v. *Krueger*, No. 713, Oct. Term, 1955, decided June 10, 1957, casts the slightest doubt on the plenary authority of the territorial sovereign over offenses committed on its soil. On the contrary, Mr. Justice Black's opinion expressly recognizes this plenary authority, apart from treaties and international agreements (slip op., pp. 13–14, fn. 29). The opinions of Mr. Justice Frankfurter and Mr. Justice Harlan also recognize, explicitly and implicitly, the dominant jurisdiction of the territorial sovereign.

been charged. And the courts of the United States would plainly have no authority to intervene. *Hirota* v. *MacArthur*, 338 U. S. 197.

To appreciate the error of the District Court's treating the matter as one of domestic law one need only recognize that the jurisdiction of a United States court over a killing within the United States would be exclusive unless covered by treaty, and could not be defeated by the terms of the Japanese constitution or statutes.

B. INTERNATIONAL ARRANGEMENTS GIVE THE UNITED STATES THE RIGHT TO EXERCISE CRIMINAL JURISDICTION WITHIN JAPAN IN CERTAIN CASES BUT IN NO CASE IS THE JURISDICTION MANDATORY AND UNITED STATES JURISDICTION MAY ALWAYS BE WAIVED

Three basic documents govern the terms under which the United States was allowed to deploy troops within Japan and to exercise criminal jurisdiction over them. These are (1) the Security Treaty, (2) the Administrative Agreement under Article III of the Security Treaty, and (3) the Protocol to Amend Article XVII of the Administrative Agreement. Under these agreements, Japan and the United States have concurrent jurisdiction to try members of the United States forces for offenses which constitute an offense both under Japanese law and under the Uniform Code of Military Justice. Where the offense is one "arising out of any act or omission done in the performance of official duty", the United States is given the "primary" right to exercise jurisdiction. In the case of offenses not arising out of an act done

in the performance of official duty, Japan retains the "primary" right to exercise jurisdiction. But if the state having the primary right "decides not to exercise jurisdiction" the other state may do so—that is, it may conduct a trial and, if the defendant is found to have committed the alleged offense, may impose punishment.

1. The Security Treaty

The Security Treaty with Japan (T. I. A. S. 2491) was signed and ratified concurrently with the Treaty of Peace with Japan (T. I. A. S. 2490). Under Article I, Japan granted to the United States and the United States accepted the right to dispose armed forces in and about Japan. Article III provided:

> The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

The Security Treaty thus provides the basic framework but none of the substantive terms relating to the exercise of criminal jurisdiction.

2. The Administrative Agreement

The Security Treaty was signed on September 8, 1951. Before it was ratified, an Administrative Agreement under Article III of the Treaty was signed on behalf of the United States on February 28, 1952. The signing was specifically authorized by the President (see Hearings on H. J. Res. 309, House Committee on Foreign Affairs, 84th Cong., 2d Sess.,

pt. 2, at p. 559). The Administrative Agreement was submitted to the Congress, and its text was before the Senate when that body gave its advice and consent to the Security Treaty. (The full texts of both the Security Treaty and the Administrative Agreement were inserted in the Congressional Record on March 17 and March 20, 1952; see 98 Cong. Rec. 2376, 2555). A reservation to the Security Treaty was proposed on the floor of the Senate which would have prevented the Administrative Agreement from being put into effect without Senate consent to ratification. This proposed reservation was voted down, and the Security Treaty was approved. 98 Cong. Rec. 2596.[4]

Substantively, two provisions of the Administrative Agreement bear on this case. Under Article XVII the United States committed itself to conclude with Japan an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Status of Forces treaty when that treaty came into effect. Under Article XXVI of the Administrative Agreement, there was established a Joint Committee as the means for consultation on all matters requiring mutual consultation regarding the implementation of the Agreement. That Article also provides that if the Joint Committee is unable to resolve any matter it shall refer it to the respective governments for further consideration through appropriate channels.

[4] See Hearing before a Subcommittee of the Committee on Armed Services, U. S. Senate, 85th Cong., 1st Sess. (William S. Girard case), June 5, 1957, at pp. 7–8; cf. Hearings before the Committee on Foreign Relations, U. S. Senate, 83d Cong., 1st Sess., Status of Forces of the North Atlantic Treaty, pp. 5, 78; Supplemental Hearings, p. 64.

3. Protocol

Following the coming into effect of the NATO Status of Forces treaty, the United States concluded with Japan, at its request and in compliance with the obligation of the United States under the Administrative Agreement, a Protocol to Amend Article XVII of the Administrative Agreement. This Protocol provides the substantive agreement under which the United States is now allowed to exercise criminal jurisdiction over certain offenses in Japan. This agreement is that in regard to criminal jurisdiction over American military personnel in Japan (1) United States military authorities shall have *exclusive* jurisdiction over offenses which are punishable by American but not by Japanese law; (2) Japanese authorities shall have *exclusive* jurisdiction over offenses punishable by Japanese but not by American law; (3) where "the right to exercise jurisdiction is concurrent" American military authorities shall have *primary* jurisdiction in relation to offenses against the property or the security of the United States, the property or the person of other members of the American armed forces, and offenses "arising out of any act or omission done in the performance of official duty"; the Japanese authorities shall have *primary* jurisdiction over all other offenses. The Protocol further provides in Paragraph 3 (c) that

> If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic con-

sideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

It was under this provision of Paragraph 3 (c)—which explicitly provides that "primary" jurisdiction may be waived—that the United States determined to waive any right to exercise its jurisdiction, and to concede to Japan's request that that state exercise its own jurisdiction. This determination was confirmed by the Secretaries of State and Defense and by the President. See the Statement, *supra*, pp. 6–7 and pp. 9–10.

C. THE EXECUTIVE DETERMINATION TO WAIVE UNITED STATES JURISDICTION IS NOT JUDICIALLY REVIEWABLE

Under the international arrangements with Japan, the right to exercise primary jurisdiction in particular cases is a right of the United States, not of the individual soldier. The decision whether or not to exercise that right is one for the United States to make in its discretion and in the light of the best interests of the country as viewed by the Government; the arrangements certainly do not confer upon each accused an option to be tried by court-martial or local court as he might choose. Moreover, the established doctrine is that the exercise of executive discretion in this political field is not subject to any review by the courts.

1. The decision as to whether paragraph 3 (c) of the Protocol, *supra*, is to be invoked, and primary jurisdiction waived, is obviously one for the Execu-

tive in its conduct of foreign affairs. The problems of foreign relations provide both the context of, and the touchstone for, the exercise or nonexercise of these waiver provisions. It necessarily follows that a decision to waive is plainly not a matter for judicial review. The courts have, since the earliest days of the Republic, recognized the conduct of foreign relations as falling within the exclusive power of the political branches of the Government, particularly the Executive. *Foster* v. *Neilson,* 2 Pet. 253; *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415; *The Chinese Exclusion Case,* 130 U. S. 581; *Jones* v. *United States,* 137 U. S. 202; *Terlinden* v. *Ames,* 184 U. S. 270; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304. See also *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U. S. 103, 111:

> * * * the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

It would be difficult to find a case in which this admonition were more applicable. Untold and unmeasurable damage to the foreign relations of the United States will inevitably result if its hands are to be tied by the type of judicial intervention which this respondent seeks. This Court, it is submitted, should reject that responsibility.

2. Respondent has argued—and the District Court has held—that the United States cannot waive jurisdiction in a case where the international arrangement provides for primary jurisdiction in the American military courts. The holding below is that a waiver under such circumstances would be a waiver of the constitutional rights of the individual (App. B, *infra*, p. 50a). But, as shown *supra*, under international law the foreign sovereign has complete and absolute jurisdiction in its own territory, absent a treaty or other agreement, and an American has no constitutional rights against exercise by Japan of its undoubted territorial jurisdiction. Whatever rights the *United States* may have, it obtains them by the international arrangements; those rights are national, not personal. The matter is exclusively one between the two nations. Even the stronger right of diplomatic immunity has always been held to be waivable by the Government, without regard to the wishes of the individual concerned. See, *e. g.*, Article 22 of the Agreement relating to the status of the North Atlantic Treaty Organization, T. I. A. S. 2992; and Section 20 of Article V to the convention between

the United Nations and the United States (Feb. 1946).[5]

Moreover, respondent can hardly be permitted to rely on those provisions of the arrangement which confer primary jurisdiction upon the United States in certain specified instances, while he denies other portions which provide for a waiver of rights by the Government. If the agreement is valid, then the United States may validly waive under paragraph 3 (c); if the United States cannot waive under paragraph 3 (c) because it is invalid, then the entire arrangement is inoperative and respondent would be relegated to his status under international law, which would mean that he would be subject to exclusive Japanese jurisdiction. To hold that the United States must exercise jurisdiction in all those instances in which it possesses primary jurisdiction would be to nullify the waiver provisions of paragraph 3 (c), for they apply only in those cases where a state *does* have primary jurisdiction. It is under this para-

[5] As for the rule that diplomatic imunity is the privilege of the sovereign, see *Davis* v. *Packard*, 7 Pet. 276, 284; *Börs* v. *Preston*, 111 U. S. 252, 256; *Ex parte Gruber*, 269 U. S. 302; *Arcaya* v. *Paez*, 145 F. Supp. 464 (S. D. N. Y.); *United States* v. *Coplon*, 88 F. Supp. 915, 921 (S. D. N. Y.), reversed on other grounds as to a co-defendant, 185 F. 2d 629 (C. A. 2).

Even the immunity of a soldier within the United States from state prosecution is a matter to be asserted not by the individual but by the military authorities, who may waive the immunity without regard to the desires of the defendant. *Harris* v. *Hunter*, 170 F. 2d 552 (C. A. 10); *Kennedy* v. *Sanford*, 166 F. 2d 568 (C. A. 5), certiorari denied, 333 U. S. 864; *Scott* v. *State*, 247 Ala. 62, 22 So. 2d 529; *Application of Baer*, 41 N. Y. S. 2d 413; *Ex parte William Sumner*, 143 Tex. Cr. 238, 158 S. W. 2d 310; *Ex parte Koester*, 206 Pac. 116.

graph that the Japanese authorities have waived their primary jurisdiction in 97% of the cases in which Japan has had such primary jurisdiction. If the paragraph is invalid or inoperative, no such reciprocity could continue.

Nevertheless, in a ruling which in effect excises paragraph 3 (c) from the international agreement, the District Court has held that where the United States has primary jurisdiction it cannot waive. Applying the wholly inapposite analogy of remission of a federal officer for state trial (*e. g., In re Neagle,* 135 U. S. 1 (see App. B, *infra,* pp. 48a–49a),* the District Court totally disregards (a) the international character of the present case, and (b) the existence and explicit terms of paragraph 3 (c). Instead, the court purports to give "the same constitutional protection" to the respondent "against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court * * *" (App. B, *infra,* p. 49a). But the cardinal fact is, of course, that Japan is not like a state of the American union, subordinate to the Federal Government and its courts. Japan is an independent sovereign power with full jurisdiction under international law to try all offenses against its laws committed on its territory. And individual

*The *Neagle* rule, on which the District Court relies, does not seem to apply to remission of servicemen to state courts for state trial in lieu of court-martial trial. See fn. 5, *supra.* Moreover, the *Neagle* rule is not a constitutional principle, but rests merely on the federal legislation providing for federal trial of federal officials who commit injuries in the course of their federal service; the rule is solely statutory.

Americans in Japan have, as we have pointed out, no constitutional or treaty rights as against a trial there by Japan for an offense against Japanese law.

3. There is also no substance whatever to the related claim that it would be contrary to Congressional legislation to remit respondent to the Japanese authorities. Congress has specifically authorized the trial of military personnel by local civil authorities. Article 74 of the old Articles of War made it mandatory on Army commanding officers to turn soldiers over to local civil authorities within the United States (41 Stat. 803):

> ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense *committed within the geographical limits of the States of the Union and the District of Columbia,* and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. * * * [Emphasis added.]

In adopting the Uniform Code of Military Justice, the geographical limitation was eliminated, and it was made discretionary rather than mandatory to turn a soldier over to local civil authorities:

ART. 14. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

* * * * *

[10 U. S. C. (Supp. IV) 814, 70A Stat. 41]

Reading Article 14 in conjunction with Article 5, which provides, "This chapter applies in all places", there can be no doubt that Congress, by legislation, has granted adequate authority to deliver soldiers for trial by civil authority at home or abroad.

4. Respondent is likewise wholly mistaken in relying upon extradition treaties as support for his position that he can contest the executive decision. In the first place, a person being extradited is within the United States, where the United States has exclusive jurisdiction, except that given up by agreement, rather than in Japan where Japan has exclusive jurisdiction except that which the United States has acquired by agreement. Persons in the United States who are sought to be extradited do have certain rights under American law. Individuals in Japan whom the Japanese seek to try for a local offense have no such rights under *American law,* as against the Japanese authorities.

Secondly, respondent is mistaken in arguing that a treaty cannot confer discretionary authority on the executive to extradite. The very case relied on by

respondent, *Valentine* v. *U. S. ex rel. Neidecker*, 299 U. S. 5, 12–13, quotes with approval extradition treaties giving the Executive discretionary power to surrender citizens to foreign countries. The Court relied on the presence of that clause in other treaties to find that it should not be implied in the French treaty there in question:

> Of far greater significance is the fact that a familiar clause—found in several of our treaties—which qualifies the exception of citizens by expressly conferring discretionary power to surrender them was omitted in the treaty with France.

For seventy years, the United States has had in effect with Japan an extradition treaty under which the turning over of citizens was discretionary on each side.[1]

D. THERE HAS BEEN NO ABUSE OF DISCRETION

Assuming that the executive decision not to exercise primary jurisdiction over respondent—to "waive" jurisdiction—is subject to any judicial review on the merits, it is clear that there was no abuse of discretion. There was a prolonged dispute between Japan and the United States as to which had primary jurisdiction. Japan's contention that the killing did not

[1] Article VII, Treaty of April 29, 1886, TS 191, 24 Stat. 1015. Similar clauses appear in the treaty with Argentina of September 26, 1896, TS 6, 31 Stat. 1883, the treaty with Uruguay of March 11, 1905, TS 501, 35 Stat. 2028 and the former treaty with the Orange Free State of October 28, 1896, TS 266, 31 Stat. 1813. The following treaties specifically confer discretion upon the executive authority: treaty with Guate-

arise from an act done in the performance of official duty was reasonable. Its position was apparently supported by the United States Army Circular (Appendix A, *infra*, p. 37a) which provided that, for the purposes of the agreements with Japan "official duty"—

> * * * is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing.

There was the further question of whether a Japanese court did not have the right to make a judicial determination of the question of whether the act done was in the performance of official duty. The Agreed Official Minutes to the Protocol (Appendix A, *infra*, p. 29a) provided that the certificate of a commanding officer—

> * * * shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

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mala of February 27, 1903, TS 425, 33 Stat. 2147; treaty with Mexico of February 22, 1899, TS 242, 31 Stat. 1818; treaty with Nicaragua of March 1, 1905, TS 462, 35 Stat. 1869, in an article reading:

> Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.

For the background of the Mexican treaty and an account of President McKinley's exercise of his discretion, in the case of Mattie Rich, see Rafuse, *The Extradition of Nationals* (1939), University of Illinois, pp. 44–46.

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This language may be said to refer to a Japanese judicial proceeding.* This has never yet been done, and there would appear to be advantages to the United States in not establishing such a precedent.

Further, Japan has waived its primary jurisdiction in over 97 percent of the cases involving members of the United States military forces where primary jurisdiction was in Japan. This is the first case in which the United States has made a decision not to exercise primary jurisdiction where, by hypothesis, it had it. It may well be that the United States concluded that to waive jurisdiction in this case was essential if the United States was to continue to ask and receive waivers in the vast number of cases where Japan had primary jurisdiction.

The very recitation of these considerations, together with the sharply disputed facts as to the circumstances of the killing (see the Statement, *supra,* and App. B, *infra,* pp. 39a–40a, 42a–43a), demonstrate not only that the decision of the Executive was reasonable but that the decision itself is one for the Executive to make rather than a court.

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*The language is derived from the British Visiting Forces Act of 1952, which was amended in passage so that the certificate of a visiting commanding officer that an offense arose from an act done in the performance of official duty would not be conclusive on the British courts. See, *e. g.* 178 Parliamentary Debates (Hansard) (Lords), 5th Series, page 1076:

> Now, the man is brought before a court in the United Kingdom and that court can say "No, it is not conclusive; we will show that the certificate is wrong." That is the only result of the Amendment.

CONCLUSION

It is respectfully submitted that the decision of the District Court is so clearly wrong, and the public interest in an early disposition of this case so great that the Court should:

1. order respondent to file a response to this petition within two days,
2. grant the writ of certiorari,
3. set the case down for further briefing and oral argument, if deemed necessary, at an early date convenient to the Court, and
4. reverse the decision of the District Court on the merits.

Respectfully submitted.

HERBERT BROWNELL, JR.,
Attorney General.

J. LEE RANKIN,
Solicitor General.

JUNE 1957.

APPENDIX A

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[Matter which might be considered particularly relevant has been printed in bold face type]

Treaties and Other International Acts Series 2490

TREATY OF PEACE WITH JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952, with a declaration
- Ratified by the President of the United States of America April 15, 1952, subject to declaration
- Ratification of the United States of America deposited at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

TREATY OF PEACE WITH JAPAN

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

* * * * *

CHAPTER I

PEACE

ARTICLE 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

ARTICLE 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, includ-

ing the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

ARTICLE 3

* * * * *

SECURITY TREATY

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at San Francisco September 8, 1951
- Ratification advised by the Senate of the United States of America March 20, 1952
- Ratified by the President of the United States of America April 15, 1952
- Ratified by Japan November 19, 1951
- Ratifications exchanged at Washington April 28, 1952
- Proclaimed by the President of the United States of America April 28, 1952
- Entered into force April 28, 1952

SECURITY TREATY

BETWEEN

THE UNITED STATES OF AMERICA AND JAPAN

Japan has this day signed a Treaty of Peace with the Allied Powers.[1] On the coming into force of that Treaty, Japan will not have the effective means to exercise its inherent right of self-defense because it has been disarmed.

There is danger to Japan in this situation because irresponsible militarism has not yet been driven from the world. Therefore Japan desires a Security Treaty with the United States of America to come into force simultaneously with the Treaty of Peace between the United States of America and Japan.

The Treaty of Peace recognizes that Japan as a sovereign nation has the right to enter into collective security arrangements, and further, the Charter of the United Nations recognizes that all nations possess an inherent right of individual and collective self-defense.

In exercise of these rights, Japan desires, as a provisional arrangement for its defense, that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan.

The United States of America, in the interest of peace and security, is presently willing to maintain

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[1] Treaties and Other International Acts Series 2490.

certain of its armed forces in and about Japan, in the expectation, however, that Japan will itself increasingly assume responsibility for its own defense against direct and indirect aggression, always avoiding any armament which could be an offensive threat or serve other than to promote peace and security in accordance with the purposes and principles of the United Nations Charter.

Accordingly, the two countries have agreed as follows:

ARTICLE I

Japan grants, and the United States of America accepts, the right, upon the coming into force of the Treaty of Peace and of this Treaty, to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack from without, including assistance given at the express request of the Japanese Government to put down large-scale internal riots and disturbances in Japan, caused through instigation or intervention by an outside power or powers.

ARTICLE II

During the exercise of the right referred to in Article I, Japan will not grant, without the prior consent of the United States of America, any bases or any rights, powers or authority whatsoever, in or relating to bases or the right of garrison or of maneuver, or transit of ground, air or naval forces to any third power.

ARTICLE III

The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments.

ARTICLE IV

This Treaty shall expire whenever in the opinion of the Governments of the United States of America and Japan there shall have come into force such United Nations arrangements or such alternative individual or collective security dispositions as will satisfactorily provide for the maintenance by the United Nations or otherwise of international peace and security in the Japan Area.

ARTICLE V

This Treaty shall be ratified by the United States of America and Japan and will come into force when instruments of ratification thereof have been exchanged by them at Washington.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

DONE in duplicate at the city of San Francisco, in the English and Japanese languages, this eighth day of September, 1951.

For the United States of America:

DEAN ACHESON
JOHN FOSTER DULLES
ALEXANDER WILEY
STYLES BRIDGES

For Japan:

SHIGERU YOSHIDA.

Treaties and Other International Acts Series 2492

ADMINISTRATIVE AGREEMENT

Between the
UNITED STATES OF AMERICA
and JAPAN

- Signed at Tokio February 28, 1952
- Entered into force April 28, 1952

13a

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ADMINISTRATIVE AGREEMENT

UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Preamble

Whereas the United States of American and Japan on September 8, 1951, signed a Security Treaty which contains provisions for the disposition of United States land, air and sea forces in and about Japan;

And whereas Article III of that Treaty states that the conditions which shall govern the disposition of the armed forces of the United States in and about Japan shall be determined by administrative agreements between the two Governments;

And whereas the United States of America and Japan are desirous of concluding practical administrative arrangements which will give effect to their respective obligations under the Security Treaty and will strengthen the close bonds of mutual interest and regard between their two peoples;

Therefore, the Governments of the United States of America and of Japan have entered into this Agreement in terms as set forth below:

* * * * *

Article II

1. Japan agrees to grant to the United States the use of the facilities and areas necessary to carry out the purposes stated in Article I of the Security Treaty. Agreements as to specific facilities and areas,

not already reached by the two Governments by the effective date of this Agreement, shall be concluded by the two Governments through the Joint Committee provided for in Article XXVI of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.

* * * * *

4. (a) When facilities and areas such as target ranges and maneuver grounds are temporarily not being used by the United States armed forces, interim use may be made by Japanese authorities and nationals provided that it is agreed that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces.

(b) With respect to such facilities and areas as target ranges and maneuver grounds which are to be used by United States armed forces for limited periods of time, the Joint Committee shall specify in the agreements concerning such facilities and areas the extent to which the provisions of this Agreement shall apply.

Article III

1. The United States shall have the rights, power and authority within the facilities and areas which are necessary or appropriate for their establishment, use, operation, defense or control. . . .

* * * * *

Article XIV

1. Persons, including corporations organized under the laws of the United States, and their employees who are ordinarily resident in the United States and whose presence in Japan is solely for the purpose of

executing contracts with the United States for the benefit of the United States armed forces shall, except as provided in this Article, be subject to the laws and regulations of Japan.

* * * * *

7. Japanese authorities shall have the primary right to exercise jurisdiction over the persons and their employees referred to in paragraph 1 of this Article in relation to offenses committed in Japan and punishable by the law of Japan. In those cases in which the Japanese authorities decide not to exercise such jurisdiction they shall notify the military authorities of the United States as soon as possible. Upon such notification the military authorities of the United States shall have the right to exercise such jurisdiction over the persons referred to as is conferred on them by the law of the United States.

* * * * *

ARTICLE XVI

It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

ARTICLE XVII

1. Upon the coming into force with respect to the United States of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal

jurisdiction similar to the corresponding provisions of that Agreement.

2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. **Such jurisdiction may in any case be waived by the United States.**

3. While the jurisdiction provided in paragraph 2 is effective, the following provisions shall apply:

* * * * *

ARTICLE XXVI

1. A Joint Committee shall be established as the means for consultation between the United States and Japan on all matters requiring mutual consultation regarding the implementation of this Agreement. In particular, the Joint Committee shall serve as the means for consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purposes stated in Article I of the Security Treaty.

2. The Joint Committee shall be composed of a representative of the United States and of Japan, each of whom shall have one or more deputies and a staff. The Joint Committee shall determine its own procedures, and arrange for such auxiliary organs and administrative services as may be required. The Joint Committee shall be so organized that it may meet immediately at any time at the request of the representative of either the United States or Japan.

3. If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels.

ARTICLE XXVII

1. This Agreement shall come into force on the date on which the Security Treaty between the United States and Japan enters into force.

* * * * *

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed this Agreement.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts authentic, this twenty-eighth day of February, 1952.

For the Government of the United States of America:

[SEAL] DEAN RUSK
EARL D. JOHNSON

For the Government of Japan:

[SEAL] K. OKAZAKI

EXCHANGE OF NOTES
United States Note to Japan.

TOKYO, *February 28, 1952*

EXCELLENCY:

I have the honor to refer to our discussion on the terms of the Administrative Agreement signed today, in which Your Excellency stated as the opinion of the

Japanese Government that, as the occupation of Japan by the Allied Powers comes to an end on the coming into force of the Treaty of Peace with Japan, the use of facilities and areas by United States forces on the basis of occupation requisition also comes to an end on the same date; thereafter, the use of facilities and areas by United States forces must be based upon agreement between the two Governments, subject to the rights which each might have under the Treaty of Peace with Japan, the Security Treaty, and the Administrative Agreement. I hereby confirm that such is also the opinion of the United States Government.

* * * * *

Accept, Excellency, the assurances of my highest consideration.

DEAN RUSK
Special Representative of the President
of the United States of America

Treaties and Other International Acts Series 2848

AMENDMENT OF ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY

Protocol, and Official Minutes,
between the UNITED STATES OF AMERICA
and JAPAN

• Signed at Tokyo September 29, 1953

• Entered into force October 29, 1953

PROTOCOL TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT UNDER ARTICLE III OF THE SECURITY TREATY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

Whereas the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces", signed at London on June 19, 1951, [1] came into force on August 23, 1953 with respect to the United States of America; and

Whereas Japan desires to conclude with the United States of America an agreement on criminal jurisdiction similar to the corresponding provisions of the said Agreement in accordance with the provisions of paragraph 1 of Article XVII of the Administrative Agreement, signed at Tokyo on February 28, 1952, [2] under Article III of the Security Treaty [3] between the United States of America and Japan;

Now the Governments of the United States of America and Japan have agreed that the existing provisions of Article XVII of the said Administrative Agreement shall be abrogated and the following provisions shall be substituted:

Article XVII

1. Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within

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[1] Treaties and Other International Acts Series 2846.
[2] TIAS 2492.
[3] TIAS 2491.

Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

(b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

2. (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.

(b) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States

armed forces or the civilian component in relation to

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

5. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces, the civilian component, or a dependent.

(c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.

6. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The military authorities of the United States and the authorities of Japan shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or the authori-

ties of Japan and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of the United States armed forces shall have the right to police any facilities or areas which

they use under Article II of this Agreement. The military police of such forces may take all appropriate measures to ensure the maintenance of order and security within such facilities and areas.

(b) Outside these facilities and areas, such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

11. In the event of hostilities to which the provisions of Article XXIV of this Agreement apply, either the United States or Japan shall have the right, by giving sixty days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, the United States and Japan shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

The present Protocol shall come into effect thirty day after the date of its signing.

IN WITNESS WHEREOF the representatives of the two Governments, duly authorized for the purpose, have signed the present Protocol.

DONE at Tokyo, in duplicate, in the English and Japanese languages, both texts being equally authentic, this twenty-ninth day of September, 1953.

For the Government of the United States of America:

[SEAL] JOHN M. ALLISON

For the Government of Japan:

[SEAL] KATSUO OKAZAKI
TAKESHI INUKAI

Agreed Official Minutes Regarding Protocol to Amend Article XVII of the Administrative Agreement Between the United States of America and Japan

Re paragraph 1 (a) and paragraph 2 (a):

The scope of persons subject to the military law of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re paragraph 2 (c):

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re paragraph 3 (a) (ii):

Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

The above statement shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure.

Re paragraph 3 (c):

1. Mutual procedures relating to waivers of the primary right to exercise jurisdiction shall be determined by the Joint Committee.

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2. Trials of cases in which the Japanese authorities have waived the primary right to exercise jurisdiction, and trials of cases involving offenses described in paragraph 3 (a) (ii) committed against the State or nationals of Japan shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon. Representatives of the Japanese authorities may be present at such trials.

Re paragraph 4:

Dual nationals, United States and Japanese, who are subject to the military law of the United States and are brought to Japan by the United States shall not be considered as nationals of Japan, but shall be considered as United States nationals for the purposes of this paragraph.

Re paragraph 5:

1. In case the Japanese authorities have arrested an offender who is a member of the United States armed forces, the civilian component, or a dependent subject to the military law of the United States with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter.

2. The United States military authorities shall promptly notify the Japanese authorities of the arrest of any member of the United States armed forces, the civilian component or a dependent in any case in which Japan has the primary right to exercise jurisdiction.

Re paragraph 9:

1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution:

(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;

(b) He shall enjoy the right to a public trial by an impartial tribunal;

(c) He shall not be compelled to testify against himself;

(d) He shall be permitted full opportunity to examine all witnesses;

(e) No cruel punishments shall be imposed upon him.

2. The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority.

3. Nothing in the provisions of paragraph 9 (g) concerning the presence of a representative of the United States Government at the trial of a member of the United States armed forces, the civilian component or a dependent prosecuted under the jurisdiction of Japan, shall be so construed as to prejudice the provisions of the Japanese Constitution with respect to public trials.

Re paragraphs 10 (a) and 10 (b):

1. The United States military authorities will normally make all arrests within facilities and areas in use by and guarded under the authority of the United States armed forces. This shall not preclude the Japanese authorities from making arrests within facilities and areas in cases where the competent authorities of the United States armed forces have given consent, or in cases of pursuit of a flagrant offender who has committed a serious crime.

Where persons whose arrest is desired by the Japanese authorities and who are not subject to the jurisdiction of the United States armed forces are within facilities and areas in use by the United States armed forces, the United States military authorities will undertake, upon request, to arrest such persons. All persons arrested by the United States military authorities, who are not subject to the jurisdiction of the United States armed forces, shall immediately be turned over to the Japanese authorities.

The United States military authorities may, under due process of law, arrest in the vicinity of a facility or area any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall immediately be turned over to the Japanese authorities.

2. The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within facilities and areas in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.

Where search, seizure, or inspection with respect to persons or property within facilities and areas in use by the United States armed forces or with respect to property of the United States armed forces in Japan is desired by the Japanese authorities, the United States military authorities will undertake, upon request, to make such search, seizure, or inspection. In the event of a judgment concerning such property, except property owned or utilized by the United States Government or its instrumentalities, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

Re application of the Protocol:

The provisions of the Protocol shall not apply to any offenses committed before the coming into

effect of the Protocol. Such cases shall be governed by the provisions of Article XVII of the Administrative Agreement as it existed prior to the coming into effect of the Protocol.

JOHN M. ALLISON
Ambassador Extraordinary and Plenipotentiary of the United States of America.

KATSUO OKAZAKI
Minister for Foreign Affairs of Japan.

TTAKESHI INUKAI
Minister of Justice of Japan.

TOKYO, *September 29, 1953.*

AGREED VIEWS

Sub-Committee on Jurisdiction

Administrative Agreement Matters

Criminal Panel

The matters of procedure, definition and interpretation set out below have been agreed to by the United States and Japanese members of the Criminal Panel, Jurisdiction Sub-committee, with respect to the Protocol and Official Minutes of 29 September 1953, amending Article XVII of the Administrative Agreement between the United States and Japan. These matters were approved by the Joint Committee under Article XXVI of the Administrative Agreement as follows:

* * * * *

Agreed Views No 37 through No 43 . . . Approved 29 October 1953, effective 28 October 1953

* * * * *

PART II

EXERCISE OF JURISDICTION

* * * * *

No 39: The term "official duty" as referred to in paragraph 3 (a) (ii) of the Protocol and Official Minutes relating thereto is understood to be any duty or service required or authorized to be done by stat-

ute, regulation, the order of a superior or military usage.

* * * * *

[Criminal Jurisdiction in Japan, Headquarters, Far East Command, APO 500, FEC Pamphlet No. 27–1, January 1956, pp. 7, 14]

UNITED STATES ARMY FORCES, FAR EAST
AND
EIGHTH UNITED STATES ARMY (REAR)
CIRCULAR 22–1

ADMINISTRATION OF MILITARY JUSTICE AND RELATED MATTERS

24 January 1956

* * * * *

23. ACTS OR OMISSIONS ARISING FROM OFFICIAL DUTY.—*a.* General.—The United States has the primary right to exercise jurisdiction over offenses arising from an act or omission of a member or civilian employee of the United States armed forces arising from the performance of official duty. (See para 3, Article XVII.) The term "official duty" as used in Article XVII, Official Minutes, and the Agreed Views is not meant to include all acts by members of the armed forces and civilian component during periods while they are on duty, but is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing. Thus, a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his "official duty." [page 21]

* * * * *

APPENDIX B

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C, PETITIONER

vs.

CHARLES E. WILSON, SECRETARY OF DEFENSE; JOHN FOSTER DULLES, SECRETARY OF STATE; WILBUR M. BRUCKER, SECRETARY OF THE ARMY; GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE; MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY; GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND; RESPONDENTS

OPINION

This is a Petition for a Writ of Habeas Corpus and for other relief, filed by William S. Girard, United States Army Specialist Third Class, against the Secretary of Defense and others, in which he alleges that on or about January 30, 1957, he was arrested and thereafter held in confinement by the military authorities of the United States and is presently held in such confinement for the purpose of being delivered to the Government of Japan for trial for an alleged offense over which that Government has no jurisdiction, nor does it have jurisdiction over

the person of the petitioner. He further alleges that his detention is illegal and in violation of the Constitution and laws of the United States, as well as the treaty rights and obligations of the Government of the United States, and that the reasons for his detention and proposed delivery to the Japanese Government are invalid in law and in violation of fundamental constitutional and legal rights of petitioner.

The petitioner is a Specialist Third Class in the Regular Army of the United States, assigned to Company F, 8th Cavalry Regiment, at Camp Whittington, Honshu, Japan, having reenlisted while in Japan on October 28, 1954, for a period of three years.

On January 30, 1957, an incident occurred while the petitioner was on a firing range known as Camp Weir Range in Japan, resulting in the death of a Japanese woman for which the American military authorities propose to deliver petitioner to the Japanese Government for trial.

The incident is succinctly described in the certificate of the petitioner's commanding officer dated February 7, 1957, from which the following is quoted:

> "* * * I certify that GIRARD, William S. RA16452809, Specialist Third Class, Company F, 8th Cavalry Regiment, APO 201, was in the performance of his official duty at 1350 hours, 30 January 1957, Camp Weir Range Area, when he was involved in the following incident: On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third Class William S. GIRARD was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that

were in the immediate area. GIRARD, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed SAKAI, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases."

This certificate has never been withdrawn or modified in any respect.

The Security Treaty between the United States of America and Japan which entered into force on April 28, 1952, provided by Article III thereof that:

> "The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments."

Article XVII of the Administrative Agreement subsequently entered into between the Governments of the United States of America and Japan, defines the offenses of which the countries have concurrent jurisdiction and exclusive jurisdiction, respectively.

Paragraph 3 of Article XVII provides that with respect to cases where the right to exercise jurisdiction is concurrent, the military authorities of the United States shall have the *primary right* to exercise jurisdiction over the members of the United States armed forces or the civilian component *in relation to offenses arising out of any act or omission done in the performance of official duty.* (Italics supplied.)

The Agreed Official Minutes regarding this provision in Paragraph 3 provide that where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that

the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

It was pursuant to these Official Minutes that the certificate of the petitioner's commanding officer was issued dated Februry 7, 1957.

The certificate by the commanding officer which was directed to the Chief Procurator, Maebashi District, Maebashi City, Honshu, Japan, continued by stating: "The United States will exercise jurisdiction in this case unless notification is given immediately that proof to the contrary exists."

Thereafter, on February 9, 1957, the Chief Procurator notified the petitioner's commanding officer with reference to his certificate as to official duty that "This office considers the proof contrary thereto exists, basing upon our examinations."

Following this exchange, there were discussions commencing in early March, 1957, by the representatives of the United States and representatives of Japan constituting a Joint U. S.—Japan Committee. On May 16, 1957, the United States representative on the Committee agreed that the United States would not exercise its asserted right of primary jurisdiction in this case. This action is said to have been taken in accordance with Paragraph 3 (c) of Article XVII of the Administrative Agreement, which reads as follows:

> "If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in

cases where that other State considers such waiver to be of particular importance."

Thereafter, on June 4, 1957, the Secretary of State of the United States and the Secretary of Defense of the United States who are named as two of the defendants in this action, issued a joint statement that they had carefully reviewed all of the available facts in this case, and have now concluded that the agreement that the petitioner be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and Agreement, and that in order to preserve the integrity of the pledges of the United States, this determination by the Joint Committee must be carried out.

This joint statement related the circumstances substantially the same as, but in more detail than, those contained in the certificate by the petitioner's commanding officer. The following is quoted from the joint statement:

"* * * * * *

"The incident occurred in a maneuver area provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40% of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area.

"Efforts to keep civilians away from the area during such military exercises have not proved effective. In this particular case, red boundary flags were, as customary, erected as a warning to civilians to keep off, and local authorities were notified of the proposed exercises. But, as was frequently the case, a number of Japanese civilians were in the area gathering empty brass cartridge cases at the time of the incident. These civilians had created such a risk of injury

to themselves in the morning exercises when live ammunition was used that the American officer in charge withdrew live ammunition from the troops prior to the afternoon exercises. In the interval between two simulated attacks during the afternoon, Girard and another soldier, Specialist 3rd Class Victor M. Nickel, were ordered by their platoon leader, a Lieutenant, to guard a machine gun and several field jackets at the top of a hill. Girard and Nickel were not issued live ammunition for this duty.

"It was while these soldiers were performing this duty that the incident occurred. Mrs. Naka Sakai, a Japanese civilian, died a few moments after being hit in the back by an empty brass rifle shell case fired by Girard from his rifle grenade launcher. She was not over 30 yards from Girard and was going away from him when he fired the rifle. Girard had previously fired similarly in the vicinity of a Japanese man, who was not hit.

"Girard's action in firing empty shell cases from the rifle grenade launcher was not authorized. He asserted that he fired from the waist, intending only to frighten the Japanese civilians. Others stated, but Girard denied, that empty shell cases were thrown out to entice the Japanese to approach.

"* * * * *"

The joint statement relates that "The Commanding General of Girard's Division certified that Girard's action was done in performance of official duty".

The joint statement further relates that during the course of the meetings between the United States and Japanese representatives, while consideration was given to referring the matter in dispute to the two Governments for settlement, this procedure was rejected as inadvisable under th circumstances, and instructions were issued that th United States representative on the Joint Commi e should continue to

press the claim for jurisdiction, but that, in case of continued deadlock, the United States representative was authorized to waive jurisdiction to Japan. After three weeks of additional negotiations "The U. S. representative waived jurisdiction in the name of the United States."

Thereafter, Girard was indicted by the Japanese judicial authorities for causing a death by wounding and at the present time he is administratively restricted to the limits of Camp Whittington.

The joint statement of the Secretaries was released on June 4, 1957 and the petition for Writ of Habeas Corpus was filed in this Court on June 6, 1957; an Order to Show Cause was issued the same day returnable on June 11, 1957, to which the respondents made return with accompanying exhibits, and the cause submitted for decision after full argument.

The decision of this case does not determine the guilt or innocence of the petitioner. The issue here is what tribunal should determine that question, and does the petitioner have a constitutional right which would be violated if he should be delivered to the Japanese Government for trial.

Nor is the question whether or not the petitioner would receive a fair trial if delivered to the Japanese Government for trial.

An affidavit of the General Counsel, Department of Defense, details the experience of the three United States Armed Services in Japan since the effective date of the Administrative Agreement in Japan and states that in a few instances suggestions of possible infringement of the rights of the accused have been made by an observer; that subsequent investigation by the Field Commander of the accused's has, in each instance, refuted or dispelled the suggestion and to date there has been no instance of the exercise by

Japan of criminal jurisdiction over United States personnel in which the conduct of the proceedings has disclosed a basis for diplomatic intervention.

On the basis of this experience, it is assumed that the petitioner would receive a fair trial if the defendants should deliver the petitioner to the Japanese Government for trial under the Japanese Constitution and laws.

The question which this Court must decide is whether the petitioner has a right under the Constitution of the United States to be tried for the alleged offense in an appropriate American tribunal and would that constitutional right be violated if he is delivered to the Japanese Government for trial.

It is uncontroverted that the petitioner at the time of the alleged occurrence was acting as a member of the American armed forces in the performance of his official duties as guard.

The certificate of the petitioner's commanding officer relates that petitioner "was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area"; that petitioner *"following instructions,* moved to the designated position near the machine gun" and *"while performing his duties as guard"* he fired the expended cartridge case. (Italics supplied.)

The joint statement issued by the Secretary of State and the Secretary of Defense, after relating the guard duty assigned to the petitioner and another soldier, states *"It was while these soldiers were performing this duty that the incident occurred."* The joint statement further says that "the Commanding General of Girard's division certified that Girard's action was done in performance of official duty". (Italics supplied.)

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At the hearing on the Petition and the defendants' return to the Order to Show Cause, and on defendants' Motion to Quash Subpoenas issued by the petitioner, the United States Attorney stated it could be assumed "that the offense arose out of an incident, an act or omission in the performance of an official duty". Subsequently, the following colloquy ensued:

> "The COURT. Mr. Gasch, you say let's assume certain facts. Is the government conceding those facts. I am assuming that your argument is addressed primarily at this stage to the motions to quash.
>
> "Mr. GASCH (United States Attorney). Yes, Your Honor.
>
> "The COURT. The Court, in passing on the motions to quash, has to know what the issues of fact are. Now, when you say let's assume he was acting in an official capacity or, in the language of the agreement, 'offenses arising out of any act or omission done in the performance of official duty', is the government conceding that at the time he came within the purview of this language?
>
> "Mr. GASCH. You Honor, I don't think this is a question in which I dispute or a case in which I dispute that interpretation of the facts.
>
> "The COURT. What I am trying to make clear is this: It seems to me that in passing on the motions to quash, I have got to know what are the issues of fact in this case and what is agreed to and what isn't agreed to.
>
> "Mr. GASCH. Very well, Your Honor, let's say as far as the government is concerned, those are the facts.
>
> "Mr. CARROLL (Counsel for Petitioner). What are the facts, Your Honor? I don't understand.
>
> "The COURT. The Court understands the concession by the government to be that at the time of the alleged offense by the petitioner, it

arose out of an act or omission done in the performance of official duty. Is that correct?

"Mr. GASCH. *That is correct.*" (Italics supplied.)

If there had been any disagreement as to this material and basic fact, the Court would have been required to issue the Writ in order that a full hearing could be held to determine the fact. In resisting the argument of petitioner's counsel that the Writ should issue, counsel for the defendants insisted that there is no material issue of fact.

Accordingly, the determination of the legal question here to be decided will be based upon the conceded fact that the incident for which it is proposed to deliver the petitioner to the Japanese courts for trial arose out of an act or omission done by the petitioner as a member of the American armed forces in the performance of official duty.

Section 8 of Article I of the Constitution of the United States provides that the Congress shall have power "to make Rules for the Government and Regulation of the land and naval Forces".

Acting under this authority, the Congress has adopted a Uniform Code of Military Justice, 50 U. S. C. A. 242, which makes subject to its provisions "all persons belonging to a regular component of the armed forces".

This Code, as its name implies, is a comprehensive Criminal Code applying to the persons subject to its provisions and spells out in detail the procedures for the Courts-Martial jurisdiction, appointment and composition of Courts-Martial, pre-trial and trial procedure, sentences, review of Courts-Martial, and definition of offenses punishable under the Code. In other words, if the petitioner is subject to prosecution for an act or omission done by him as a member of

the American Armed Forces in the performance of official duty, the Uniform Code of Military Justice establishes every procedure to be followed.

Since the petitioner's act was committed in the performance of official duty, under the principles announced by the Supreme Court in the case of *In Re Neagle,* 135 U. S. 1, the petitioner is accountable only to United States Federal jurisdiction for any act or omission. Additional authorities in support of this proposition are *Johnson* vs. *State of Maryland,* 254 U. S. 51; *Brown* vs. *Cain,* 56 F. Supp. 56; *Lima* vs. *Lawler,* 63 F. Supp. 446; *Colorado* vs. *Maxwell,* 125 F. Supp. 18; *In Re Fair, et al.,* 100 Fed. 149; *In Re Wulzen,* 235 Fed. 362.

In some of these cases, the factual situation was in dispute and required lengthy hearings to determine if the petitioner was acting in performance of official duty. Not so in the instant case, since the status of the petitioner is conceded.

The defendants placed reliance upon the decisions of this Court in the cases of *May* vs. *Wilson,* C. A. No. 128-56, D. C., D. C.; and *Cozart* vs. *Wilson,* 98 U. S. App. D. C. 437, 236 F. 2d, 732. Both of these cases arose out of offenses committed when the petitioners were off duty and, therefore, factually are distinguishable from the case now under consideration. *May* was not appealed, and in *Cozart* the Supreme Court granted a Petition for Writ of Certiorari and vacated the judgment of the Court of Appeals, remanding the case to the District Court with directions to dismiss the petition for Writ of Habeas Corpus upon the ground that the cause is moot. 352 U. S. 884. In pursuing this procedure, the Supreme Court cited *United States* vs. *Munsingwear, Inc.* 340 U. S. 36, which states "that procedure clears the path for future relitigation of the issues between the parties and

eliminates a judgment, review of which was prevented through happenstance."

Counsel for the defendants also cite cases in support of the proposition that "the jurisdiction of a Court-Martial is not exclusive and does not preempt the jurisdiction of state courts to deal with acts which violate state law as well as military law."

In none of the cases cited in support of this proposition were the accused charged with an offense performed in line of duty.

In *Caldwell* vs. *Parker,* 252 U. S. 376, the petitioner was charged with murder of a civilian at a place within the jurisdiction of the State of Alabama and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. *Kennedy* vs. *Sanford,* 166 F. 2d 568, related to a charge of conspiracy; *United States* vs. *Matthews,* 49 F. Supp. 203, was a charge of rape; and *United States* vs. *Canella,* 63 F. Supp. 377, related to a charge of bribery. Clearly these cases are distinguishable from the facts in the instant case.

Counsel for defendants further cite a series of cases in support of the proposition that "if there is any question as to whether a particular act was strictly within the scope of the authority of the soldier or whether such act constituted the only means available to perform the assigned duty, then the state court rather than a court-martial must be allowed to proceed with the case." These decisions are not in point in view of the stipulation that there is no issue of material fact with respect to the status of the petitioner at the time of the incident.

Applying the same constitutional protection to the petitioner against his delivery to a foreign State that would be applied to his delivery for prosecution in a state court, it follows that the threatened action by

the defendants is illegal and in violation of the Constitution and laws of the United States.

The petition is for a Writ of Habeas Corpus which appears to be authorized by *Cozart* vs. *Wilson, supra,* and *Eisentrager, et al.* vs. *Forrestal,* 84 U. S. App. D. C. 396, 174 F. 2d 961, since the petitioner is administratively restricted to the limits of Camp Whittington and, therefore, he is sufficiently restrained for the purposes of habeas corpus. However, since the petitioner remains a member of the United States Armed Forces in Japan and may be prosecuted in Court-Martial proceedings for the offense with which he is charged, the petition for the Writ will be denied and the Court will treat the complaint as a Petition for Declaratory Judgment and Injunction under the prayer of the complaint for other relief and, as such, will decree that the proposed delivery of the petitioner to the Japanese Government would violate rights of the petitioner guaranteed by the Constitution of the United States and will be enjoined.

This opinion may be treated as the Court's Findings of Fact and Conclusions of Law, and counsel for petitioner will submit an appropriate order in conformity herewith.

Joseph C. McGarraghy,
(sgd) JOSEPH C. MCGARRAGHY,
Judge.

JUNE 18, 1957.

In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS

ORDER

This matter having come on for hearing upon the petition for writ of habeas corpus and the Court having considered the petition, the Return and Answer to Rule to Show Cause and all the exhibits filed herein, and after a full and fair hearing having been accorded the parties thereto, it is by the Court this 18th day of June, 1957,

ORDERED, that in accordance with the Opinion filed this date, the petition for writ of habeas corpus is denied, the rule to show cause is discharged, and that respondents and those over whom they exercise command function be, and they hereby are, enjoined from delivering petitioner to the Japanese Government.

(s) JOSEPH C. MCGARRAGHY, *Judge.*

APPENDIX C

Statement of the Secretary of Defense

I, Charles E. Wilson, Secretary of Defense, make this statement for submission to the Supreme Court of the United States in connection with the case of *Girard* v. *Wilson et al.*

1. I am acquainted with the decision of the District Court of the District of Columbia in the case of *Girard* v. *Wilson et al.*, and with the order issued by that Court with respect to Specialist Third Class Girard, restraining me as Secretary of Defense and those over whom I exercise command function "from delivering petitioner to the Japanese Government."

2. The Department of State at the instance of the Department of Defense has negotiated numerous agreements with foreign nations dealing with the exercise of jurisdiction by United States courts martial within the territorial jurisdiction of those foreign countries. Chief among these agreements is the Agreement Between the Parties To the North Atlantic Treaty Regarding the Status of Their Forces. Another such agreement is the Protocol to Amend Article XVII of the Japanese-United States Administrative Agreement, which is similar to the NATO Status of Forces Agreement as to criminal jurisdiction provisions. There are also numerous other international agreements which deal with the same problem of criminal jurisdiction. In the negotiation of these agreements, we have been deeply conscious of our obligation to secure fair and impartial treatment for all members of our Armed

Forces serving overseas, with due regard, however, to the need for proper observance of the laws of the countries in which they serve.

3. The decision and order of the District Court in the case of *Girard* v. *Wilson et al.* questions the validity of certain important operating provisions of these agreements and, in particular, the provisions of paragraph 3 (c) of Article XVII of the Japanese-United States Administrative Agreement. According to the records maintained by the Department of Defense, during the three-year period ending November 30, 1956, over 32,000 cases involving personnel of the Department of Defense arose which were subject to the primary jurisdiction of foreign courts. Through the application of the waiver provisions of the pertinent agreements, such as paragraph 3 (c) of Article XVII of the Japanese-United States Administrative Agreement, foreign governments waived their jurisdiction in about 73% of all the cases. The waiver provisions of these agreements are therefore of great significance in the practical administration of the Armed Forces overseas.

4. The implications of the decision of the District Court in the case of *Girard* v. *Wilson et al.* are such that an early resolution of the legal issues raised is essential to the carrying out of the status of forces agreements throughout the world. The very large number of cases involved and the necessity of seeing that justice is dispensed without undue delay require that the legal issues raised in the case of *Girard* v. *Wilson et al.* be resolved quickly. Moreover, failure to secure prompt resolution of these problems may disrupt discipline by causing the premature commencement of numerous legal action to test the propriety of administrative decisions made in other cases

in carrying out existing treaties and other international agreements.

5. According to the records of the Department of Defense, Specialist Third Class Girard's term of enlistment in the Regular Army will expire on October 27, 1957. Unless there is a resolution of the issues raised in the case of *Girard* v. *Wilson et al.* before that date, additional legal complications, I am informed, may well arise. It is of great importance that the ability of this country to carry out obligations assumed with respect to another nation should not be affected by any change of Girard's status.

6. During the year ending November 30, 1956, the Japanese Government waived its primary jurisdiction in over 5400 cases involving American military personnel—an average of over 100 a week. Inability to carry out our commitment in the *Girard* case may well in the next month or two affect hundreds of new cases in which otherwise Japan would be expected, under its past policy, to grant waivers of its primary jurisdiction. A substantial number of these might therefore result in confinement in Japanese prisons, thus placing a serious strain on relations between the two governments and jeopardizing the very satisfactory military and political arrangements that have been established between them.

(Sgd) C. E. Wilson,
CHARLES E. WILSON,
Secretary of Defense.

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